Supreme Court of the United States

OCTOBER TERM, 1904.

NO. 172.

THE NEW ORLEANS GAS LIGHT COMPPANY,
PLAINTIFF IN ERROR.

versus

THE DRAINAGE COMMISSION OF NEW ORLEANS,
THE SEWERAGE AND WATER BOARD,
SUCCESSORS, SUBSTITUTED.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

The New Orleans Gaslight and Banking Company was created by an Act of the Legislature of Louisiana approved April 1st, 1835, Section 37 of which authorized it "*to lay pipes and conduits, at the expense of said Company in any of the streets of said city.*" And by Act approved April 20th, 1870, the Crescent City Gaslight Company was incorporated, and Section 9 of said Act authorized it "*to lay pipes or conduits at the expense of the Company, in any of the streets or alleys of said City of New Orleans, where*

the same may be required, in such manner as may produce the least inconvenience to the City or its inhabitants." On the 29th March, 1875, the two above-named Companies consolidated, and formed one corporation under the name of the New Orleans Gaslight Company, which is the plaintiff in error before this Court.

At the time of the passage of said Acts of 1835 and 1870, there had never been any provision in the Constitutions of Louisiana to the effect that "*Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.*" That provision was first placed in the Constitution of 1879 (Art. 156), and reproduced in the Constitution of 1898 (Art. 166).

The Drainage Commission of New Orleans was created by Act No. 114 of 1896, by Section 4 of which it was given full power to control and execute the Drainage of the City of New Orleans, substantially according to plans and specifications adopted by the City Council of said City, and by Section 8 of said Act, as amended by Act 63 of 1898, it was given "*the right in all streets, and in and over all lands of the State in the Parish of Orleans, and of the City of New Orleans * * * for any of its works.*"

It is not necessary to make the above statement any broader, because defendant in error admits that the New Orleans Gaslight Company had a franchise to lay its pipes and conduits in the streets of New Orleans, and the plaintiff in error, in its brief (p. 8), makes the following admission:

> "*The question of fact that the drainage works might*
> "*have been constructed so as not to touch the mains of*
> "*the plaintiff Company, dropped out of the case, and*
> "*we accept as the elemental premise for our legal*
> "*structure the fact stated by the engineer of the Drain-*

" age Commission, that the changes and removal of " gas mains were necessary to carry out the plans " and specifications for drainage."

In the construction of the drainage canals, it was found that certain pipes or conduits of the said Gaslight Company were in the way and said Company was requested to shift the position of same in order to meet the exigencies of the case.

The fact that the Drainage Commission, under advice of counsel, paid the cost of the shifting of such pipes up to a certain date, and, also under advice of counsel, refused to pay the cost of such shifting after said date, and that, by agreement of the parties, the Gaslight Company continued to shift its pipes when necessary and kept an account of the cost thereof to await a final decision by the courts, cannot in any manner, control the decision of the present case.

This suit was filed by said Gaslight Company, to recover from the Drainage Commission, the cost of such necessary shifting of the position of said Company's pipes on the following grounds:

"First. That your petitioner is informed and be- "lieves that the interference with and injury to the "works of petitioner were not absolutely necessary and "the works of the Drainage Commission could have "been constructed without inflicting the loss and dam- "age complained of."

Which said first ground was subsequently abandoned, and,

" Second. If such work was necessary in the " interest of a public work, still, acts done and rights " claimed under pretended authority of said Act No. "114 of the acts of session of 1896, by the defendant, " impair the obligation of the contract between the

" plaintiff and the State of Louisiana, in violation of " Article I, Section 10 of the Constitution of the United " States, and of Article 166 of the Constitution of this " State; or said acts are and constitute a taking or " damaging of private property for a public purpose, " which carries with it and imposes the legal obliga- " tion to make ' just and adequate compensation for " the injury inflicted by such taking or damaging.'

" And petitioner shows that Section 8 of said Act " No. 114, which purports to give to such Drainage " Commission the right to expropriate property—vests " all the power and obligations of the State itself, in " this regard, in said Drainage Commission, and " imposes on said commission liability for property "expropriated or damaged; and in so far as said Sec- " tion 8 confers a ' right in all streets ' in the city of " New Orleans—such ' right ' must be held to have " been conferred subject to prior grants, and to the " extent that this may be denied and absolute right " claimed—said Section 8 especially is, as to petitioner, " null, void and unconstitutional under said Article 1, " Section 10, Constitution of the United States, and " Article 166 of the State Constitution."

Note that the " Fourteenth Amendment " to the Constitution of the United States was not specifically referred to in the petition.

The Supreme Court of Louisiana in a final decision, affirmed the judgment of the lower court and rejected plaintiff's demand, for the reasons stated in its opinion the *syllabus* of which is as follows, to-wit:

(SYLLABUS.)

" 1. The plaintiff Company was authorized by an Act of " the General Assembly prior to the Constitution of " 1879 to lay pipes and conduits in any of the public " ways, alleys and streets of New Orleans where same

"might be required, in such manner as might produce "the least inconvenience to the City or its inhabitants. "It must be held to have accepted this privilege sub- "ject to the paramount and inalienable right of the "State to construct or authorize to be constructed by "the city, sewers or drainage canals under the streets, "whenever, in its judgment, the public interests "demanded, and in aid of the construction of such "sewers to cause the plaintiff Company, at its own "expense, to change the location of its own mains. The "State, in requiring the shifting of the position of the "mains, simply enforced, in its own favor, one of its "reserved rights."

"2. The rights and obligations of the parties are to be "tested by the provisions of the Constitution of 1868." (*1879 in the printed record is a typographical error.*)

"3. This plaintiff had no vested right to occupy any par- "ticular position in the streets, such right as it had "was *ab initio*, not an absolute but an imperfect right "contingent, and [illegible] in its nature, controlled "by law and the regulation of the police authorities."

"4. The only damage claimed in this action is the sum of "money expended by the plaintiff in changing the "position of its mains. It is not asserted that the "pipes of the plaintiff have been injured by removal "nor that any of its work or materials have been or "will be utilized by the State or city for their own "purposes, that the value of the franchise has been "lessened or that there has been any physical 'tak- "ing' of its property.

"This demand of the plaintiff falls under the rule "*of damnum absque injuria.*"

From which decision, the said Gaslight Company has taken a writ of error and has filed the Assignment of Errors, a copy of which is printed on page 9 of its brief.

ARGUMENT.

In commenting upon the case of CHICAGO R. R. vs. CHICAGO, 166 U. S. 226, in which this Court decided that:

> "Expenses of erecting gates, planking the cross-"ing, and maintaining flagmen, which will necessarily "result from the laying out of a street across a rail-"road must be regarded as incidental to the exercise "of the police powers of the State, and do not consti-"tute an element of the just compensation to the rail-"road."

The learned counsel for the plaintiff in error, says at page 39 of his brief:

> "In this case, as in all others involving the same or "similar issue, we constantly meet, as a fundamental "premise, that persons taking rights *upon* the street "must be considered to do so with knowledge of, and "acquiescence in, the reserved and 'inalienable' "power of regulation. The right of the governing "power to 'regulate' the use of streets as such; to "impose conditions on private and public traffic for "safety, expedition and convenience, is elemental."

If the learned counsel admits the correctness of that decision and of the other decisions quoted in the appendix, notably:

MUGLER v. KANSAS CITY, 123 U. S. 623.
CHICAGO vs. QUINCY, 27 N. E. REP. 193.
NATIFNAL W. WORKS CO. vs. KANSAS CITY, 28 FED. REP. 921.
RAILROAD CO. v. WAKEFIELD, 103 MASS. 261.
JAMAICA BOND CO. vs. BROOKLINE, 121 MASS. 5.
COLUMBUS GAS CO. vs. COLUMBUS, 19 L. R. A. 510.

it seems to us that he virtually abandons his case; for, we can see no difference between the right to regulate the sur-

face of the street and the right to regulate the space under the surface. It is certainly as necessary for the health and protection of the people that drainage canals and sewer pipes be laid under the surface, as it is necessary, sometimes, to change the grade of a street, to lay out a street across a railroad right of way, or to widen a water course.

Suppose there were a ridge ten feet high extending through the center of a city from one end to the other and, under franchises granted to a railroad company to lay its tracks on the streets and to a gas company to lay its pipes in the streets, the former had built its road on said ridge and the latter had placed its mains in said ridge. And that with the growth of the city, it became necessary to grade said ridge to the level of the city. There is no doubt that the railroad company, at its own cost, would have to re-adjust its tracks to the new grade. What about the gas company? Would it have greater rights than the railroad company, and would it be entitled to claim from the city the cost of adjusting its mains to the new conditions? Certainly not, the fact that its mains had been placed underground would give it no greater right to compensation than if they had been placed on the surface.

Note that in the case of *Jamaica Bond Co. vs. Brookline,* the action was in damages for the expense of changing the location of water pipes in accordance with a change of grade of the street. The plaintiff alleged that it had laid its water pipes in the street according to the then established grade of the street, and the city had changed the grade and required plaintiff to change the location of its pipes. The Court decided that the injury was *damnum absque injuria.*

In the case of *Columbus Gas Co. vs. Columbus*, the action was for damages for the expense of re-locating gas pipes to conform to a change in the grade of a street. The Court said:

> "A gas company laying its pipes in the streets of a "city, under a grant from the city, in conformity with "an established grade, does so subject to the right of "the city to change the grades of the street whenever "the necessities of the public require it; and, in the ab- "sence of wantonness or negligence on the part of the "city the company cannot maintain an action for dam- "ages occasioned by the necessity of taking up and re- "laying its pipes in order to accommodate them to the "new grade."

The case of *National Water Works Co. vs. Kansas City*, is even more in point, for Mr. Justice Brewer there decided that the plaintiff could not recover for the cost of relaying a water pipe to make way for a sewer, although the water pipe had been originally laid under the direction of the city. Said the learned Justice:

> "Sewerage is a matter unquestionably affecting "largely the public health, and no municipality can "make a contract divesting or abridging its full con- "trol over such matters. * * * * The contract be- "tween the plaintiff and the defendant is to be inter- "preted in the light of this well established rule; and, "so interpreted, the plaintiff took its right to lay its "pipes in the streets of the city, subject to the para- "mount and inalienable right of the city to construct "sewers therein wherever and whenever in its judg- "ment the public interests demand."

The right to construct drainage canals is certainly as great as that to construct sewers. And we confess our inability to see the line which the learned counsel for the plain

tiff in error attempts to draw, between the rights of a company whose mains are underground and those of a company whose tracks are on the surface of the ground.

Why should not the city or the State have the same right to exercise the police power under as well as over the streets? Does not the space under the streets belong to the public as well as that on the surface and that above the surface?

And at the present time, when in all large cities, there are under the streets, gas and water mains and electric wires of railways, telegraph, telephone and electric light companies, besides drainage canals and sewers, the police power must be exercised under as well as on the surface of the streets.

Suppose it became necessary to dig a large open canal in the centre of a city, primarily for drainage, and secondarily for navigation; and that said canal had to cross the tracks of a street railway company at ten or twenty different streets. According to the weight of authority, the railway company would have to build bridges at its own cost to cross said canal, and if levees were necessary on each side of said canal the railway company would have also, at its own cost, to change the grade of its tracks. We believe that the counsel for the plaintiff in error will admit that proposition, or, at least, that he will not dispute it.

Suppose the mains of a gas company, those of a water works company, and the wires of an electric light company, had been laid three or four feet under ground in the streets crossed by said canal, and obstructed the said canal. Would the learned counsel contend that the gas, water and electric light companies would be entitled to the cost of shifting their mains to meet the exigencies of the case? That is virtually the position he takes; but we fail to see why the gas, water and electric light companies should

have such superior rights and should not, like railroads, be subjected to expenses rendered necessary by changed conditions established for the safety, welfare and convenience of the public?

In the case of CLEVELAND vs. CITY COUNCIL OF AUGUSTA, 102 Ga. 233 (L. A. R. 43, 638), the Court said:

> "It has been held, under like provisions, that it was "the duty of a railroad company, though its track was "originally constructed at grade with a public high- "way, to construct a bridge or viaduct whenever the "same might become necessary *(State, Minneapolis vs. "Minneapolis & St. L. R. R. Co.,* 39 Minn. 219); and "that although a crossing might have been adequate "when constructed, yet, if by reason of increase of "business of the railroad or travel on the street, it be- "came dangerous, or seriously obstructed travel on the "street, the company was bound to provide some other "mode of crossing, as by carrying the street under or "over the track. *State, Minneapolis vs. St. Paul M. & "M. R. Co.* 35 Minn. 131, and authorities cited on page "136. Under such a statute the corporation does not "discharge its duty by making such a crossing as to "provide for the wants of travelers at the time of con- "struction of the road. If, by the increase of popula- "tion in the neighborhood, or by reason of the increas- "ing use of the highway, the crossing, which was at "the outset adequate, becomes inadequate, it is the duty "of the railroad corporation to make such alteration as "will meet the present needs of the public who have "occasion to use the highway. *Cooke vs. Boston & L. "R. Corp.,* 133 Mass. 185; 10 *Am. & Eng. R. Cas.* 328. "To the same effect, see Pierce, Railroads, 457, and "authorities cited; 3 Elliott, Railroads, §1111; *English "vs. New Haven & N. Co.,* 32 Conn. 240. The duty "being a continuing one, it is not fulfilled by putting "the street, at the time of building the railroad, in "such condition as not to impair or interfere with its

"use at that time, nor by maintaining it in such con-
"dition as would have accomplished that end had the
"state of things originally existing continued. The
"duty has reference to future exigencies, and requires
"the railroad company from time to time to put the
"streets in such a condition as changed circumstances
"may render necessary. The duty of the railroad
"company to construct and maintain at its own expense
"suitable crossings at the intersections of their rail-
"roads with highways applies as well to highways laid
"out and opened after the construction of the railway
"as those existing prior to its construction. *Chicago &*
"*N. W. R. Co. vs. Chicago,* 140 Ill. 309; *Chicago B. &*
"*Q. R. Co. vs. Chicago,* 166 U. S. 226; *Louisville N. A.*
"*& C. R. Co. vs. Smith,* 91 Ind. 119; *State, Lancaster*
"*County vs. Chicago B. & Q. R. Co.,* 29 Neb. 412.

"We think it follows, as a logical conclusion from
"the principles of law above announced, that, when the
"corporation constructed its tracks across the public
"highway in question, it did so subject to the right of
"the public authorities to require such changes in the
"crossing from time to time as the public safety and
"welfare might demand, or to readjust its track and
"crossings to a change of grade of the street, demanded
"for the safety and convenience of travelers upon the
"highway, and that in doing so the expense incurred
"is involved in its compliance with a police regulation
"of the statute; and we know of no law whereby a cor-
"poration or natural person can recover damages on
"account of being compelled to render obedience to a
"public regulation designed to secure the common wel-
"fare. *Chicago O. A. R. Co. vs. Joliet,* 105 Ill. 388."

It is certainly for the common welfare of the people of New Orleans that the State of Louisiana has created the Drainage Commission and charged it with the control and execution of the drainage of New Orleans, and given it the

right in all streets of said city for any of its works. And whenever the pipes and conduits of the New Orleans Gaslight Company are in the way of the proper execution of the drainage plans, it is but just and proper that said company should readjust its pipes and conduits to permit of the execution of a great work of public utility.

The State of Louisiana, in 1835 and 1870, gave said company the right to lay its pipes and conduits in the streets, but the State never bartered nor abandoned its superior right of control over and in and under said streets.

Unless the New Orleans Gaslight Company can show that it has a right under the street, superior to the rights of railroad on the street, we fail to see why it should be entitled to a compensation that railroads would not be entitled to.

The Supreme Court of Louisiana has decided, in the interpretation of its constitution and of its statutes, that the requirement of the Drainage Commission that the Gaslight Company shift its mains to meet the exigencies of a public work, did not constitute a taking or damaging of property in violation of the articles of its constitution, and that decision is not subject to review by this Court in the absence of a specific point raised in the case that such a requirement violates the provisions of the "Fourteenth Amendment."

The only question raised by the Gaslight Company in its pleadings and in its assignment of errors, is that the acts done by the Drainage Commission under the authority of Act 114 of 1896, are in violation of Article 1, Section 10, of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts.

There is no law in the State of Louisiana by which the contractual rights of the Gaslight Company have been im-

paired. Its right to lay pipes and conduits in the streets is not affected. It is simply required to shift the position of some of its mains. Said company admits the right of the Drainage Commission to require such shifting, but it claims that it is entitled to compensation for the cost of such shifting. We cannot see wherein the Constitution of the United States has been violated.

In 1835 and 1870, when the Gaslight Company was given the right to lay its mains in the streets, the Constitution of Louisiana contained no provision that private property should not be taken or damaged without compensation first being paid.

If, therefore, previous to the Constitution of 1879, the State, through the Drainage Commission, or a similar agency, could have required the shifting of the mains of the Gas Company, in order to make way for a work of public necessity, there is now, in the action of the State, no impairment of the contract of the Gaslight Company.

The briefs of the learned counsel who tried this case in the courts of Louisiana, are so full and convincing, that we print them as an appendix to this brief, and respectfully ask for them the high consideration to which they are entitled.

We shall not discuss the numerous authorities cited in the brief of the distinguished counsel for the plaintiff in error. Many of them expound principles which we do not dispute, and none of them are, in our humble opinion, authority for the contention that the Gaslight Company is entitled to compensation for the cost of shifting its mains.

The learned counsel, however, on page 37 of his brief, calls attention to a "slip" of court and counsel in having quoted the case of *Clapp vs. Spokane,* 53 Fed. Rep. 516, which, he says, was reversed on rehearing. It is true that the injunction originally granted in that case, was subse-

quently refused, but the principles of law announced in the original decision and quoted by court and counsel, were not reversed on rehearing.

But even though the Court and counsel had made a "slip" in quoting from that case, the learned counsel for the plaintiff in error has made two "slips." On page 29 of his brief, he quotes from the case of *Miller vs. N. Y. R. R. Co.*, 21 Barb. 513, having overlooked the fact that said decision had been overruled by the Court of Appeals of New York in *Albany Northern R. Co. vs. Brownwell,* 24 N. Y. 345 (43 L. R. A. 640). And on page 35 of his brief, he quotes as a saying of the Court in *United States vs. Lynah,* 188 U. S. 469, an extract which is a quotation from *Tumpelley vs. Greenbay,* 13 Wall. 166.

The learned counsel has quoted on page 27 of his brief the following section from ELLIOTT, on "Roads and Streets":

> "But the police power is not unlimited, and while "rights to use streets for electric wires and poles are "taken subject to that power, neither the State nor its "municipalities can destroy contracts and vested rights "by improper regulations and enactments under the "guise of the exercise of the police power. It *is gener-"ally held that a right granted by a municipality, by or-"dinance for a valuable consideration, constitutes an ir-"revocable contract, at least where it is accepted and "acted upon by the grantee, and money is expended "upon the faith thereof.* In such cases the vested "right and the obligation of the contract cannot be "materially impaired by attempting to withdraw the "consent of the municipality, or imposing other condi-"tions not contemplated by the contract or law and "not properly police regulations,"

That authority supports our contention. It says that rights to use streets for electric wires are taken subject to the police power. We claim that the right to use the streets for gas mains was taken subject to this same power, and that it is in the exercise of the police power that the State has provided for the construction of a drainage system. The State is not attempting to destroy the vested rights of plaintiff by improper enactments, but is simply asking it to shift its mains in obedience to a most proper enactment. There is no attempt to take the mains of plaintiff and apply them to a public purpose, nor to damage them, nor to withdraw from it any of its charter rights. The same thing is asked of the Gaslight Company which the State could ask of any company having rights on the streets, that is: shift your mains to meet the exigencies of a public work.

But, says the learned counsel, the State and city have the right, in the exercise of the police power, to regulate traffic on the surface of the streets, and, when necessary, to compel railroad and electric light companies at their own expense, to shift their tracks, poles, and wires to suit the necessities of increased population and travel; but gas and water companies, and even electric light companies, whose pipes and conduits are under ground, must be compensated when asked to do the same shifting. Bear in mind that the learned counsel does not claim that companies cannot be made to shift their mains, he simply claims that, because said mains are underground, the cost of shifting them must be borne by the public.

If that argument were correct, here is the curious condition that might arise in the City of New Orleans. The State or the city might provide for the widening of the New Basin or the New Canal, two canals open to navigation and running to the heart of the city. The railroad tracks and the

electric poles on the surface along the edge of said canals would have to be shifted at the expense of the railroad and electric companies, but the gas and water mains under the surface along the edge of said canals, would have to be shifted, but at the cost of the State or city. The mere statement of this proposition is the *reductio ad absurdum*.

We respectfully submit that there was no error in the judgment of the Supreme Court of Louisiana, and that the same should be affirmed.

OMER VILLERÉ,

Special Counsel of the Sewerage and Water Board.

APPENDIX.

The New Orleans Gas Light Company
versus
The Drainage Commission of New Orleans.

SUPREME COURT OF LOUISIANA.

No. 13,897.

BRIEF ON BEHALF OF THE DRAINAGE COMMISSION, DEFENDANT AND APPELLEE.

SYLLABUS.

I.

In creating the Drainage Commission of New Orleans, and in authorizing and directing it to execute a system of drainage for the City of New Orleans, the Legislature was validly exercising the police power of the State in the interest of the health and comfort of its citizens.

Canal & Navigation Co. vs. City of New Orleans, 39 An. 309.

Inhabitants of Melpomene St. vs City of New Orleans, 14 An. 452.

Bass vs. State of Louisiana, 34 An. 494.

II.

The franchise of the plaintiff Company to make use of the public streets of New Orleans was taken, subject to

II.

the implied condition that the State, in the exercise of its police power, might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might, incidentally, cause damage to the property held by plaintiff under its prior franchise. The loss caused by such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria.*

Bass vs. State, 34 An. 494.
Peart vs. Levee District, 45 An. 421.
Eagan vs. Hart, 45 An. 1360.
Carondelet Canal & Nav. Co. vs. New Orleans, 38 An. 308.
Vidalat vs. City of New Orleans, 43 An. 1121.
Ruch vs. City of New Orleans, 43 An. 275.
Pontchartrain R. R. Co. vs. Levee Commissioners, 570.
Eldridge vs. Trezevant, 160 U. S. 455.
Dubose vs. Levee Commissioners, 11 An. 165.
Nat'l Waterworks Co. vs. City of Kansas, 28 Fed. Rep. 921.
R. R. Co. vs. Wakefield, 103 Mass. 261.
City of Cincinnati vs. Penny, 21 Ohio State, 499.
Brown vs. Duplessis and City of New Orleans, 14 An. 842.
Dillon, Municipal Corporations, Secs. 656, 671.
Lewis on Eminent Domain, Secs. 107, 109.

III.

The principle is well established that the Legislature cannot part with or bargain away any portion of its police power, and from this principle it follows that even if the plaintiff received an exclusive grant and right in and to the space in the streets of the City of New Orleans, occupied by its mains and conduits, such grant

III.

would have constituted no bar to the perfection of a system of drainage.

Butchers' Union vs Crescent City Co., 111 U. S. 746, and authorities cited.

IV.

There was no taking of private property in this case within the sense of the constitutional prohibitions, and no impairment of the contract evidenced by plaintiff's charter. The cases cited by the appellant distinguished and shown to be inapplicable.

STATEMENT OF PROCEEDINGS.

This suit was instituted in the Civil District Court by the New Orleans Gas Light Company against the Drainage Commission of New Orleans. The object of the suit is to recover the sum of $4,065.58, with legal interest from judicial demand, for alleged damages sustained by the plaintiff by reason of the fact that the construction of the new drainage system of the City of New Orleans necessitated the removal of pipes and conduits belonging to the plaintiff, thereby entailing damages and expenses on its part for which it seeks to hold the Drainage Commission responsible. The plaintiff alleged that by virtue of certain Acts of the Legislature mentioned in its petition, it had been granted the exclusive right and privilege of making and selling gas for illuminating and other purposes in the City of New Orleans, for a certain fixed period expiring in the year 1925. That in order to carry out said privilege, it was granted the right to construct and lay through the streets, alleys, and ways of the City of New Orleans, mains, pipes and conduits at its own ex-

pense, as same might be required for the conduct of its business and for the purpose of carrying out the objects of its charter. That the making and selling of illuminating gas, and the delivering of same for consumption, could not possibly be carried on in any other way or manner, and that the laying of such mains, pipes and conduits was and is an absolute necessity to the conduct of its business and to the carrying out of the objects for which the plaintiff was incorporated. That in pursuance of the authority so granted, and for the purposes aforesaid, it had theretofore laid under the surface of various streets in the City of New Orleans its mains, pipes and conduits. It averred further that the privileges granted as aforesaid constituted a contract protected by the Constitution of Louisiana and the Constitution of the United States; that the Drainage Commission, a body created by the Legislature of the State for the purpose of constructing and maintaining a system of drainage for the City of New Orleans, had undertaken, in pursuance of the authority conferred upon it by the Legislature, to construct certain canals, conduits, and drains in and through the streets and public places of the City of New Orleans, and to give to such canals, conduits and drains such dimensions and sections as it might choose, without regard to the rights or property of the plaintiffs or others, and that it had so located and constructed such canals upon streets and places where the pipes, conduits and mains of the Gas Light Company were situated. That in August, 1898, in carrying out said plans of drainage of the City of New Orleans, the proposed canals and mains of the drainage system came in contact and conflict with the mains and conduits of the Gas Light Company. That the Drainage Commission thereupon demanded and required that the Gas Light Company

should remove its conduits and mains so as not in any way to interfere with the canals to be constructed by the Drainage Commission.

This request the Gas Light Company refused to comply with upon the grounds: First, that its property could not be interfered with under any conditions in the manner threatened; and, second, that if, as a matter of law, the object for which the Drainage Commission was created, and the works which it had to construct, involved the exercise of an act of high public nature which would authorize the taking or damaging of private property, yet that such taking or injury could not be consummated without compensation duly and previously made. That in order to avoid the necessity of an injunction, which would have delayed the drainage work, an understanding was reached between the parties that the Gas Light Company should undertake to make the necessary changes in its mains, pipes and conduits, in conformity with the plans made by the engineer of the Drainage Commission, keeping a full and accurate account of the actual cost of such work, and that the Drainage Commission should pay such cost of removal. Accordingly, the Gas Light Company entered upon the removal of certain of its pipes at a cost of $2,481.38, which the Drainage Commission paid. That immediately thereafter, the Drainage Commission notified the Gas Light Company that it had been advised that it was not liable for any such costs, but that the Gas Light Company must remove same at its own expense, and accordingly notified the Gas Light Company that it would bear no further expenses in the premises. That under these conditions, the parties agreed that, without prejudice to the rights of either, the Gas Light Company should continue to make such removals keeping an account of the

cost thereof, and that an amicable suit should be brought to test the liability of the Drainage Commission therefor. That the cost of work of removal thus incurred by it at the filing of this suit amounted to $4,065.58.

The plaintiff further averred that the Drainage Commission was responsible and liable to it for that sum for the following reasons:

1. That the interference with and injury to the works of the plaintiff were not absolutely necessary, and that the works of the Drainage Commission could have been constructed without inflicting the loss and damage complained of;

2. That if such work was necessary for the interest of the public, and though done under sanction of Act 114 of 1896, creating the Drainage Commission, it impaired the obligation of the contract between the plaintiff and the State of Louisiana in violation of the Constitutions of Louisiana and of the United States, and constituted a taking or damaging of private property for public purposes without just and adequate compensation; and

3. That Section 8 of Act 114 of 1896, which purports to give the Drainage Commission the right to expropriate property, vested all of the power and obligations of the State itself in this regard in the Drainage Commission, and imposed upon it liability for property expropriated or damaged; and in so far as said section conferred "a right in all streets" in the City of New Orleans, such right must be held to have been conferred subject to prior grants. And in so far as said act attempted to give such rights regardless of prior grants, it was unconstitutional and void.

The defendant to this petition interposed an exception of no cause of action, which on hearing was overruled. Thereupon, the defendant, reserving the benefit of the ex-

ception above mentioned, answered, denying generally the allegations of the petition; admitting that it was created and organized under the provisions of Act 114 of 1896, and acts amendatory of and supplemental to said act, for the purpose of providing for the drainage of the City of New Orleans; and admitting that it claimed under the provisions of said laws to have authority to establish and construct drainage canals in and through any and all streets and public places of the City of New Orleans where same might be deemed necessary to accomplish the purpose for which it was created, and to give to such canals such location and dimensions as might be necessary to properly drain the city; and further admitting that in the establishment and construction of such drainage canals, it came in contact with the mains and conduits owned and constructed in public streets by the plaintiff Company, and that it required the plaintiff to so remove or change the location and position of its said conduits as not to obstruct or impair the efficiency of said drainage canals. It averred that by the acts of the Legislature aforesaid, it was charged with full power to control and execute the drainage of the City of New Orleans, and was authorized to execute and carry out substantially the plan for such drainage adopted by the Council of the City of New Orleans by Ordinance 10,091, Council Series, approved July 10, 1895, in so far as it might find said plan desirable and practicable, with the right, however, to change or modify the same as in its judgment circumstances might require. That it was further vested with the right of eminent domain, and the right in and through all steets and over all lands of the State and of the City of New Orleans, in the Parishes of Orleans, Jefferson and St. Bernard, and generally with reference to the accomplishment of the con-

struction of said drainage system, was vested with the police power of the State. It further averred that, under the powers so conferred, it had proceeded to the establishment and construction of said drainage system as so adopted by the City Council as aforesaid, save only where same had been modified for its improvement in the judgment of the Commission; and that in the prosecution thereof had proceeded to lay and construct drainage canals of proper and reasonable dimensions in and through various streets of this city. It admitted that the plaintiff Company, claiming authority under certain acts of the Legislature set forth in its petition, had laid under the surface of various streets certain mains and conduits, and that for the proper construction, maintenance, and efficiency of said drainage canals it was necessary and proper that the location of said gas mains and conduits should be, and were required to be changed. It denied, however, that it had acted unreasonably or oppressively, or in anywise illegally, in so requiring the moving of said mains and conduits, and denied that it was indebted to the plaintiff in any sum whatever on that account; but on the contrary, it averred that it had acted in a reasonable and prudent manner, and solely with a view of securing an efficient and proper drainage system, as required by law, and that it had the right to require in the construction of this public work the plaintiff to so conform its mains and conduits as not to obstruct or impair the efficiency of said system.

Upon the issues so made, the cause went to trial, and after the hearing of the testimony and the argument of counsel, judgment was rendered by the Judge of Division E, rejecting the plaintiff's demand at its costs. From this judgment the plaintiff prosecutes this appeal.

IX.

STATEMENT OF THE CASE.

By an Act of the Legislature, passed April 1, 1835, the New Orleans Gas Light & Banking Company was incorporated and was given "the sole and exclusive privilege of vending gas lights in the City of New Orleans and its faubourgs and the City of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;" to which end it was authorized "to lay pipes and conduits at its own expense in any of the public ways or streets of those localities, *having due regard to the public convenience.*" By amendments of its charter made in 1854, the Company's right to engage in banking was by its consent withdrawn, and the remaining rights granted by the original act were continued to the corporation under the name of the New Orleans Gas Light Company, to be enjoyed until April 1, 1875, when its corporate privileges were to expire. By amendments to its charter made in 1860, its charter was extended to April 1, 1895, the exclusive privilege granted by the original charter not, however, to exist beyond the time fixed in the act of incorporation.

By an Act approved April 20, 1870 (Act 97 of 1870, Extra Session), another Company, under the name of the Crescent City Gas Light Company, was incorporated. The charter provided (Sec. 8) that that Company, its successors and assigns, should for fifty years from the date of the expiration of the charter of the New Orleans Gas Light Company, have the sole and exclusive privilege of making and supplying gas lights in the City of New Orleans. By Section 9, said Company was authorized at any time after the passage of that act, "to lay pipes or conduits at the expense of the Company in any of the streets or alleys of said City

of New Orleans where the same may be required *in such manner as may produce the least inconvenience to the city or its inhabitants;* and provided also that the Company shall afterward repair with the least possible delay the streets they have broken."

By Act No. 106 of 1873 (printed with Acts of 1874), the date of the expiration of the New Orleans Gas Light Company's exclusive franchise was fixed at April 1, 1875, and the franchises granted to the Crescent City Gas Light Company for fifty years from that date were confirmed to it. The Act further declared that Sections 9 and 12 of the Act of 1870 should remain unamended and unimpaired.

On March 29, 1875, the New Orleans Gas Light Company, and the Crescent City Gas Light Company, by proper action of their stockholders, consolidated pursuant to the provisions of Act 157 of 1874, under the name of "The New Orleans Gas Light Company," and the consolidated Company is the present plaintiff in this suit.

Drainage Legislation.

On February 6, 1893, an ordinance was adopted by the City Council of New Orleans, which recited in its preamble the distressing condition into which the drainage of the City of New Orleans had fallen, and the necessity for a uniform and general plan of drainage, and ordained that the sum of $17,500 of the permanent public improvement fund should be set aside and appropriated for the making of a thorough and complete topographical survey of the City of New Orleans, and for the obtaining of all necessary data requisite for the formulation of a complete plan of drainage, and instructing the City Engineer, immediately upon the information being obtained, to prepare and

submit to the Council of the City of New Orleans a complete and comprehensive plan of drainage, with sufficient detail to enable it to be thoroughly understood, and in such form as to designate the manner in which the work could be executed by degrees as money might be appropriated from time to time for the purpose of drainage. It was further ordained that the City Engineer, in conjunction with the Mayor and the Chairman of the Committee on Water and Drainage, should have authority to call, if necessary, an advisory board of expert engineers on drainage for the purpose of confirming by competent authority such plans as might be adopted. (Tr., P. 58.) (Printed Record, p. 83.)

By an ordinance adopted March 30, 1893, the above mentioned ordinance was amended so as to authorize the Mayor to appoint three competent engineers to form an advisory board of engineers for the purpose of approving or disapproving of the plans prepared by the City Engineer; for the making of a topographical survey of New Orleans; and obtaining information necessary for the formulation of a plan of drainage; as also to thoroughly investigate and pass upon such plan of drainage as may be submitted to the City Council for its approval. (Tr., p. 60). (Printed Record, p. 84.) Pursuant to this last named ordinance, the then Mayor appointed Messrs. B. M. Harrod, Rudolph Herring, and H. B. Richardson.

By an ordinance adopted November 24, 1893, the City Council dedicated the sum of $700,000, derived from the sale of franchises of city railroads to Henry Beer, as a sacred fund to be devoted exclusively and solely for drainage purposes. And further provided that plans for the preliminary topographical survey, prepared by the City Engineer

or other persons, should be submitted to an advisory board thereby created, to be composed of H. B. Richardson, B. M. Harrod, Rudolph Herring, R. M. Walmsley, J. C. Denis and Edward Fenner, for approval or recommendation, but that no plan of drainage should be finally adopted by the said advisory board, unless it received the approval of a majority of the City Council. (Tr., pp. 60-61.) (Printed Record, p. 85.) Thereafter this advisory board entered upon the work of formulating a comprehensive and thorough plan for the drainage of the City of New Orleans, and on April 29, 1895, submitted its report in detail to the City Council.

On July 10th, 1895, the City Council, by ordinance adopted and approved with some modifications the plan of drainage submitted by the advisory board. (Tr., p. 62.) (Printed Record, p. 86.)

By another ordinance adopted October 23, 1895, the City Engineer was authorized to secure the services of Messrs. Rudolph Herring, B. M. Harrod and H. B. Richardson, as consulting or advisory engineers on the plans and specifications for the drainage which he was then preparing. (Tr., p. 63. (Printed Record, p. 87.)

This committee of engineers thereupon prepared and submitted to the City Council the specifications for the construction of a system of drainage for the City of New Orleans, which are found at page 65 of the Transcript; and on January 24, 1896, the City Council, after various amendments noted at pages 66, 67 and 68 of the Transcript, (Printed Record, pp. 87, 88, 89), adopted these specifications by a *viva voce* vote.

By an Act of the Legislature approved July 9, 1896 (Act 114 of 1896), the State created a board to be called the

"Drainage Commission of New Orleans," composed of certain designated officials of the City of New Orleans, of the Orleans Levee Board, and of the Board of Liquidation of the City Debt. By Section 4 of said Act said Commission was vested with full power to control and execute the drainage of the City of New Orleans, and authorized to proceed to execute and carry out substantially the plan for such drainage adopted by the City Council of said City by Ordinance 10,091, Council Series, approved July 10, 1895, so far as it might find said plan desirable and practicable, with the right, however, to modify the same as in its judgment circumstances might require. It was further given by said section power to make rules and regulations for the protection and conservation of all works under its control, both completed and incomplete, and of all works necessary or incidental thereto, and making any violation of such rules or regulations punishable by fine. It was further provided by said section that the City of New Orleans should transfer to the custody and control of said Commission so much of the existing drainage plant or plants as the said Commission might deem necessary for their purposes.

By Section 8 of said Act, it was provided that said Commission "* * * shall have the power to expropriate property according to existing laws by legal proceedings in its name; and the right in all streets, and in and over all lands of the State and the City, in New Orleans or in the Parish of St. Bernard, is hereby granted to said Commission for any of its works." The portion of Section 8 above recited was amended by Act 63 of 1898 to read as follows: "* * * and shall have the power to expropriate property according to existing laws by legal proceedings in its

name in the Parishes of Orleans, *Jefferson,* or St. Bernard; and the right in all streets, and in and over all lands of the State *in the Parish of Orleans, and of the City of New Orleans, and in and over all lands of the State in the Parishes of Jefferson and St. Bernard,* is hereby granted to said Commission for any of its works."

CONSTRUCTION OF DRAINAGE WORKS.

Pursuant to the authority of said Act 114 of 1896, the Drainage Commission of New Orleans was organized and proceeded to carry out the plan of drainage mentioned in said Act. (Tr., p. 50.) (Printed Record, p. 30.) And such modifications as were made in the plans mentioned in said act were *in the reduction of dimensions of canals.* (Tr., p. 51.) (Printed Record, p. 30.) The location of all canals, the construction of which is called in question in this suit, is fixed by the plans adopted by Ordinance No. 10,091, C. S., and mentioned in said Act of 1896. (Tr., p. 51.) (Printed Record, p. 30.) So that the canals, the construction of which is called in question here, were in effect located by the Legislature, and the size and dimensions thereof fixed by that body. No testimony or evidence of any kind was offered by the plaintiff to sustain its allegation that "the interference with and injury to the works of petitioner were not absolutely necessary, and the works of the Drainage Commission could have been constructed without inflicting the loss and damage complained of." (Tr. p. 6.) (Printed Record, p. 4.)

The defendant, on the other hand, though it did not bear the burden of proof, proved that the interference was minimized as much as possible. (Tr., p. 53.) (Printed Record, p. 32.)

XV.

No testimony or evidence was offered by the plaintiff to show that the canals and conduits of the Drainage Commission were larger or more numerous than reasonably necessary to efficiently drain the City. On the other hand, the defendant offered proof to show that the location and dimensions of these canals had been fixed by such competent engineers as L. W. Brown, City Engineer, B. M. Harrod, M. B. Richardson and Rudolph Herring (see "Report on Drainage," Tr., p. 62 (Printed Record, p. 87), and approved and ratified by the City Council (Tr., p. 62) (Printed Record, p. 86), and adopted by the Legislature by Act 114, of 1896.

We think, therefore, that it has been shown that said drainage canals were of proper and reasonable size; were properly located with reference to the object for which they were built, and the public interest to be subserved; and were a necessary public work.

By reference to the stipulation of counsel (Tr., p. 72) (Printed Record, p. 91), it will be seen that, in the event of a judgment for the plaintiff, it was agreed that items amounting to $325 were to be deducted from the plaintiff's claim, and items amounting to $170 were to be rejected as in case of non-suit; thus leaving the amount to be recovered in this suit, should judgment be in favor of plaintiff, the sum of $3,570.38.

Points.

I.

In creating the Drainage Commission of New Orleans and in authorizing and directing it to execute a system of drainage for the City of New Orleans, the Legislature was

validly exercising the police power of the State in the interest of the health and comfort of its citizens.

II.

The franchise of the plaintiff Company to make use of the public streets of New Orleans was taken subject to the implied condition that the Legislature in the exercise of its police power might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might incidentally cause damage to the property held by plaintiff under its prior franchise. The loss caused by such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria.*

(*a*) The franchise of the plaintiff Company itself recognizes the existence of the inherent legislative power to authorize subsequent works of public improvement.

(*b*) The principle is well established that the Legislature cannot part with or bargain away any portion of its police power; and it follows from this principle that even had the plaintiff received an exclusive grant of and right in and to the space in the streets of the City of New Orleans to be occupied by its mains and conduits, such exclusive grant would have constituted no bar to the confection of a system of drainage.

III.

There was no taking of private property in this case within the sense of the constitutional prohibitions and no impairment of the contract evidenced by plaintiff's charter. The distinction between *expropriation* resulting from the exercise of the right of eminent domain, and *appropriation* resulting from an exercise of the police power of the State is well settled.

ARGUMENT.

First Point.

In creating the Drainage Commission of New Orleans and in authorizing and directing it to execute a system of drainage for the City of New Orleans, the Legislature was validly exercising the police power of the State in the interest of the health and comfort of its citizens.

We do not understand it to be contended that Act 114 of 1896 was not a valid exercise of the police power of the State; and the above point is made simply by way of premise to the argument which follows. It may, therefore, be dismissed by a reference to the case of *State vs. Flower, 49 An. 1199*, where this Court sanctioned and upheld the legislation creating the Drainage Commission of New Orleans; and to the following cases which state the general principle:

Canal & Nav. Co. vs. City of New Orleans, 39 An. 309.

Inhabitants of Melpomene St. vs. City of New Orleans, 14 An. 452.

Bass vs. State of Louisiana, 34 An. 494.

Second Point.

The franchise of the plaintiff Company to make use of the public streets of New Orleans was taken subject to the implied condition that the Legislature in the exercise of the police power of the State might subsequently authorize in such streets other works subservient to the health and comfort of the citizens of New Orleans, the execution of which works might incidentally cause damage to the property held by plaintiff under its prior franchise. The loss caused by

such subsequently authorized work, when executed with reasonable care, was *damnum absque injuria.*

(*a*) The franchise of the plaintiff Company itself recognizes the existence of the inherent legislative power to authorize subsequent works of public improvement.

(*b*) The principle is well established that the Legislature cannot part with or bargain away any portion of its police power; and it follows from this principle that even had the plaintiff received an exclusive grant of, and right in and to the space in the streets of the City of New Orleans, occupied by its mains and conduits, such exclusive grant would have constituted no bar to the confection of a system of drainage.

From the foregoing statement of the case, it will appear that the New Orleans Gas Light Company received from the Legislature the right to a certain *user* of the public streets of the City of New Orleans; and that subsequent to this grant, the Drainage Commission was authorized to plan and carry out a system of drainage in and through the same streets, the execution of which system entailed the removing and relaying of the pipes, mains and conduits of the plaintiff, the temporary suspension of its *user* of the said streets, and an incidental damage for which it now claims compensation. The right to recover that compensation is the sole question in this case, and this question is narrowed to a pure legal one by the plaintiff's entire failure to adduce any proof that the defendant unreasonably and oppressively *qua* the said plaintiff, executed the work it was charged with the performance of.

But for this suit it would seem that the question presented had been foreclosed beyond all manner of dispute. both by the decisions of this Court construing the statutes

of Louisiana and by the decisions of other Courts of the highest authority.

In the case of *Bass vs. The State, 34 An. 494,* the question at bar was elaborately discussed.

The State Board of Engineers, under an act giving them authority to that end, constructed certain levees in the Parish of East Carroll. The plaintiff, suing with the consent of the State, evidenced by a special act, set up:

1. That the method pursued in the construction of said levees was improper, and, as to him, oppressive and unnecessary.

2. That whether the work done *was necessary or not,* the State had no right to do the same without making compensation for the resulting damage.

The Court first pointed out that all property, no matter how absolute the title, is held subject to the general police power of the State to be exercised for the general good of the citizens. It then distinguished those governmental acts which are done in pursuance of such police power and which give no rise to compensation; and those which are done in pursuance of the right of eminent domain and which do give rise to a right of compensation. The Court then said:

> "The powers which the State possesses necessarily must be exercised by agents, and are transmissible to them by the State. Where, therefore, the State has the legal right to undertake a public work, the execution of which is likely unavoidably to entail private injury, the State has a right as a corollary of delegating the power to agents, who then are clothed with the necessary incidental authority to do that which the State herself primarily had the right of doing. No injury, wrong, or damage, can be done, or can result

from the commission of an act authorized by law, and therefore none can be recovered. *Lex neminem laedit.* 1 Cal. 462, 4 Cal. 81." (P. 499.)

* * * * *

"If the work done under the act causes injury, the damage thus sustained is not taking of land for public use, and the act is a sufficient defense to an action brought to recover such loss. *Green vs. Swift,* 47 Cal. 549." (P. 502.)

* * * *

"We, therefore, conclude that the State, in the exercise of her police powers, has the exclusive right to determine of the propriety, location, and mode of building levees within her borders; that after she has so decided and has contracted for the public enterprise, a citizen or riparian owner on whose land the levee is about to be built, cannot effectually remonstrate and require that it be constructed differently; and that in case of non-compliance with his demand by the Board of public officers in charge of the work, and in the event of subsequent damages sustained by him, he cannot hold the State liable either for compensation as for property taken for public purposes, or for the injury sustained by him in consequence of the destruction of the same."

To the same effect are the following cases:
Peart vs. Levee District, 45 An. 421.
Egan vs. Hart, 45 An. 1360.

The case of *Carondelet Canal & Navigation Co. vs. City of New Orleans, 38 An. 308,* is not distinguishable from the foregoing, and sanctions our contention.

The plaintiff enjoined the City from widening a certain ditch which lay adjacent to the plaintiff's canal, which widening encroached upon the plaintiff's landing and pre-

vented ingress and egress thereto, so that its commerce was greatly incommoded and obstructed.

The Court held that the City "has control of its streets, and may determine in what manner they shall be improved, and it has equal power over its drainage and can perfect a system that will conduce to the health and comfort of its inhabitants, but it cannot exercise this power recklessly and in wanton disregard of the rights of its inhabitants. The need of enlarging this ditch as a part of the plan to improve the drainage of the City is demonstrated by the testimony, but that may be done and all the benefits derivable from it can be realized without injuring the plaintiff."

The Legislature in the case at bar having authorized a certain plan of drainage, and the plaintiff now before the Court having been damaged by the carrying out of that plan, and making no claim, and adducing no proof, that the work could have been done so as to avoid injury, a certain portion of the language just cited is inapplicable. But none the less the Court recognized the general principle contended for, by dissolving the injunction which had been sued out, in so far as such injunction operated to prevent the defendant from carrying out its work in a proper and reasonable way.

In *Vidalat vs. City of New Orleans, 43 An. 1121,* the plaintiff was the assignee of a market lease. The City let to the Barber Asphalt Co. a contract for the laying of asphalt paving upon a portion of Poydras Street in the vicinity of the Pilie Market. The contractor found it necessary, in order to carry out its contract to tear up the banquettes adjoining the market; and it appears that such banquettes by reason, of the action of the contractor, were rendered impassable for several months, and access to the

market was to a large extent prevented. The plaintiff thereupon sued for damages alleged to arise out of such obstructions. The Court held that such loss was a mere incident to the making of a necessary public improvement, and damages therefor could not be recovered.

In the case of *Ruch vs. City of New Orleans, 43 An. 275,* the question was again reviewed. The plaintiff sought an injunction to restrain the City from appropriating without previous compensation, a portion of his property on Peters Street for the purpose of enlarging that street. He claimed that the City's action amounted to an expropriation, which entitled him to compensation under the provisions of the Constitution of 1879.

The Court again distinguished the right of *appropriation* as an incident of the police power of the State resting upon the servitude vested in the State for the benefit of the public in all land adjacent to public navigable rivers and in all public roads and streets, and the right of *expropriation.* It said:

"This right of *appropriation* which is recognized in the quoted provisions of the Code is, and was co-existent with the right of *expropriation* as provided for in Revised Civil Code, R. C. C. and the R. S., Sec. 1149, *et seq.*

"All of those provisions pre-existed the Constitution with the 155th and 156th articles of which the right of appropriation is said to conflict. This of itself leads to the supposition of their entire compatibility. But the two principles are of well recognized and ancient origin—one being and exercise of the police power, any loss sustained, thereby entitling the injured party to no recompense, the same being *damnum absque injuria;* the other being the execution of the right of eminent domain, the damages entailed being compensable.

"*Bass vs. State,* 34 An. 494; *Chaffe vs. Trezevant,* 38 An. 746."

"The enjoined proceedings were evidently undertaken in pursuance of the police power of the municipality, the object being confessedly the enlargement of the public domain on the Mississippi River front and within city limits; hence, the ordinance was constitutional and valid, for unquestionably, the city had ample authority for the enactment of an ordinance of the character of the one promulgated. The provisions of the Constitution placing restrictions upon the exercise of the power of *expropriation* have no reference to the *police power* of the State, or the municipality in the State. The latter is necessarily an inherent and reserved power of a State, and is practically unlimited—and its exercise is subject to legislative power alone." (Italics by the Court.)

The distinction made in this case between the appropriation which results from an exercise of the police power of the State and the expropriation which results from an exercise of the power of eminent domain was again recognized in the case of the *Pontchartrain R. R. Co. vs. The Levee Commissioners, 49 An. at page 570.* The Court, after stating that there is no "taking of property" in the technical sense where the police power is exerted, said:

> "Any injury that may arise to private property is consequential to the exertion of governmental functions and entirely disconnected with expropriation for public purposes. The distinction between expropriation and consequential injuries arising from the exercise of the necessary functions of Government is stated in one of the cases cited by the defendant. *In the one case, no compensation is due for the reason with others there is no encroachment on private property; in the other there is an expropriation, and hence the owner's right to compensation.*"

The question presented to this Court in this and all the above cited cases, was presented to the Supreme Court of

the United States in the case of *Eldridge vs. Trezevant, 160 U. S. 452,* where a strenuous effort was made to establish the point made in this case, that there was a taking of private property for public purposes which entitled the owner both under the Constitutions of Louisiana and of the United States, to previous compensation.

The Court cited the case of *Dubose vs. Levee Commissioners, 11 An. 165*; *Bass vs. The State 34 An. 494;* and *Ruch vs. New Orleans, 43 An. 275,* with approval, and followed them without hesitation, using the following language:

"In the case of *Bass vs. State of Louisiana,* 34 La. An. 494, the Supreme Court again held that an owner of land abutting on the Mississippi River could not recover for damages inflicted upon his property by the State Board of Engineers and contractors in locating and constructing a public levee, but put the immunity of the State mainly upon the proposition that such public works are done in the exercise of the police power, and did not advert to the doctrine of servitude upon which the previous decision had placed such immunity.

"But we do not understand that the Supreme Court of the State intended thereby to repudiate the doctrine of a servitude explicitly declared in the Code and recognized through a lengthened period by many decisions. If to approve the judgment in that case, it were necessary to hold that the State and its agents can take private property wherever situated, and apply it to any public purpose and escape from the duty of compensation by terming such action an exercise of the police power, it is difficult to see how such a conclusion could be reached by the courts of a State in whose constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made. But, as we have said, it is not necessary to so read the decision in

question, nor to consider whether in such a case a remedy could be found in any provision of the Federal Constitution."

While the removal of the plaintiff's mains and conduits in the interest of a system of drainage appears to us to have been an act within even the narrowest definition of the police power, in view of the foregoing language, we submit that the judgment of the court below can be affirmed upon the ground indicated. Both the streets of the City of New Orleans and the riparian space reserved for the use of the public by law are public things; and the servitude enjoyed by the community in the one cannot be distinguished from that enjoyed by it in the other.

The principle recognized in the foregoing decisions has been recognized and applied in numerous cases arising in other States of the Union.

A case precisely in point is the case of the *National Waterworks Co. vs. the City of Kansas, 28 Fed. Rep. 921.* The plaintiff, in the year 1883, laid down certain water pipes in one of the streets of the City of Kansas. The year after the City dug a sewer in the same street, in consequence whereof, the plaintiff was compelled to take up and lay its pipe in another place. The action was brought to recover the cost and expense of this re-location. The contention that is advanced in the case at bar, was advanced by the plaintiff in the cited case, to-wit, that by laying its pipes in the place and manner authorized and directed by the City, it had acquired such a vested property right in an undisturbed location and possession, as to entitle it to resist any future trespass or invasion thereof; while the contention of the City was that the matter of the sewerage was one affecting public health; that it could not,

if it would; and it did not, if it could, contract away the right to construct sewers in any part of the public streets; and that the plaintiff took its contract right to lay its pipes in such public streets subject to the paramount and inalienable right of the City to construct its sewers wherever therein in its judgment the public interest demands.

The Court sustained the City's contention. It cited the case of *Butchers' Union vs. Crescent City Co., 111 U. S. 746*, sustaining legislation which abolished the exclusive privileges granted to certain butchers to erect and maintain slaughter houses, and permitting, upon certain terms, other slaughter houses, and said:

"The contract between the plaintiff and the defendant must be interpreted in the light of this well established rule; and, so interpreted, the plaintiff took its right to lay its pipes in the streets of the city subject to the paramount and inalienable right of the City to construct sewers therein whenever, and wherever, in its judgment the public interests demand. Laying its pipes subject to this right of the City, it has no cause of action, if, in consequence of the exercise of this right, it is compelled to re-lay its pipes."

A similar ruling is to be found in the case of *R. R. Co. vs. Wakefield, 103 Mass. 261.*

The plaintiffs filed their bill against certain commissioners authorized to widen the draws on the Charleston River Bridge and the Warren Bridge, to restrain them from widening said draws in such a manner as to prevent the plaintiffs from running their cars as usual over those bridges *without interruption.* It appeared from the allegations of the bill that the proposed work would consume from four to six weeks, and that the interruption would

cost the plaintiffs in loss of business about $400 a day. The Court said:

"In our judgment, the right of way granted to the plaintiffs upon these bridges is the same as it is everywhere else, a right to use the highway in common with others. The privilege granted to others of adapting a portion of each bridge to their peculiar mode of conveying passengers, was not intended to give them the control of the way; and upon the bridges, as well as elsewhere, and by these plaintiffs, as well as by all others, the right of passage is to be enjoyed in subordination to the general right of the appropriate public authorities to make from time to time all such needful repairs, alterations, and improvements as the public good may require."

On these grounds, the Court said that it could not view the statute authorizing the change in the bridges "as an encroachment upon the plaintiff's charter, or a withdrawal of any part of their grant," and hence dismissed its bill.

In the case of *City of Cincinnati vs. Penny, 21 Ohio State 499*, the plaintiff sued for damages for injuries to a dwelling situated on a lot abutting a city alley, in which alley a public sewer was constructed. In digging out the sewer, the lateral support to the foundations of the plaintiff's house were withdrawn so that such foundations gave way. The work appeared to have been carefully done and the damage could not reasonably have been avoided. It was held that the plaintiff had to submit to the loss.

As stating the general principle, we further refer the Court to:

Dillon, Municipal Corporations, Secs. 656, 671.
Lewis on Eminent Domain, Secs. 107, 109.

As illustrating the nature of the appellant's right in the streets of New Orleans the leading case of *Brown vs.*

Duplessis and City of New Orleans, 14 An. 842, is instructive. There a property holder sought to enjoin the City from granting a right of way for the establishment of a city railroad on the ground that no portion of the public streets could be appropriated to private use, and on the further ground that such appropriation damaged their abutting properties. The Court held that the streets of the City were destined for public use, but not for any *particular mode* of public use; and hence, the conceded right of pedestrians and vehicles in such streets could not exclude the right of the State to authorize other modes of conveyance. This reasoning applies here. The maintenance of gas mains and pipes is one of the uses, but only one, of which the streets are susceptible. In the nature of things, no exclusive right to any portion of such streets could be granted, and none was granted. As in the laying of its pipes and mains the plaintiff temporarily dispossessed the public of the free use of the streets, so the public has in turn temporarily dispossessed the plaintiff of its acquired use, in order that another needed use of the streets might have place. If the plaintiff can recover damages for such temporary dispossession by the public, then it would seem that members of the public would have had the right to recover for their temporary dispossession by the plaintiff. But the case above cited, in effect, holds that no right to such damages existed; and this decision goes far to supporting the contention of the defendant here.

The foregoing authorities appear to us to dispose of the case; and the following additional considerations are adduced only out of our sense of our duty to present all the points that may bear upon the decision of the important question presented:

(*a*) From the statement of the case heretofore made, it will appear that the Legislature in granting to the Gas Light Company the right to lay and maintain its mains and pipes in the public streets of the City of New Orleans, was careful to stipulate that the laying of such pipes and mains should be done with "due regard to the public convenience" and "in such manner as may produce the least inconvenience to the City or its inhabitants." As the nature of the plaintiff Company's business was, and is, such as to necessitate the frequent laying of new pipes and mains, and the taking up, repairing and re-laying of old ones, it can scarcely be doubted but that the provisions of the charter just cited were intended as an unequivocal expression of the continued right of the State to guard the health and convenience of the public during the whole period that that charter should continue in force. Such stipulations, we submit, are evidence of the retention by and in the State, so far as the plaintiff was concerned, of its general police power; and are wholly inconsistent with the theory here advanced that the State has so absolutely parted with, and the plaintiff has so absolutely acquired, control of the streets of New Orleans, as to disentitle the State from making, by such a designated agency as the Drainage Commission, any further work which might incidentally affect the plaintiff's *user*, no matter to what extent such work might subserve the public health and comfort.

(*b*) Apart from this consideration and from the authorities already cited, the judgment of the court below is fortified by the principle that no Legislature can barter away at the expense of future generations its inherent right to protect the health and morals of its constituents. If it be conceded, as it must be conceded in this case, that drainage is a work which subserves the public health, then it

follows that had the plaintiff's charter contained an express covenant that no person or body corporate should thereafter, or during the term of such charter, receive any right or privilege in the streets of the City of New Orleans of a kind to affect in any way whatsoever the rights already acquired by the plaintiff, such covenant would have been void and would have constituted no bar to the execution of suh a plan as was carried out by the appellee. This point was decided in the case of *Butchers' Union vs. Crescent City, 111 U. S. 746.* The Legislature of the Sate of Louisiana, in the year of 1879, granted the Butchers' Union the exclusive privilege of establishing stock landings and slaughter houses in New Orleans, the privilege to endure for a term of twenty-five years.

In 1881, the City of New Orleans, acting under an authority conferred upon it by the Constitution of 1879, granted further privileges for the establishment of stock yards and slaughter houses to the appellant company. The exercise of these privileges the complainant in the court below sought to enjoin upon allegations that the ordinance granting them impaired the obligation of its contract and was, therefore, null and void. The Court found:

1. That the complainant's grant was an exclusive one. (Opinion, p. 747.)

2. That the grant had all the essentials of a valid contract. (Opinion, p. 749.)

3. That the ordinance of the City of New Orleans impaired the obligation of that contract. (Opinion, p. 749.)

The Court then proceeded:

"The appellant, however, insists that so far as the Act of 1869 partakes of the nature of an irrepealable contract, the Legislature exceeded its authority and had no power

to tie the hands of the Legislature in the future from legislating on that subject without being bound by the terms of the statute then enacted. This proposition presents the real point in the case."

The Court in deciding the point adversely to the appellant, said:

"While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it cannot by any contract limit the exercise of those powers to the prejudice of the general welfare. These are the *public health* and *public morals.* The preservation of these is necessary to the best interests of social organization, and a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

"It cannot be permitted that when the Constitution of a State, the fundamental law of the land, has imposed upon its Legislature the duty of guarding by suitable laws the health of its citizens, especially in crowded cities, and the protection of their person and property by suppressing and preventing crime, that the power which enables it to perform this duty can be sold or bargained away under any circumstances as if it were a mere privilege which the Legislature could dispose of at its pleasure." Citing:

Boyd vs. Alabama, 94 U. S. 645.
Moore vs. The State, 48 Miss. 147.
Metropolitan Board vs. Barrie, 34 N. Y. 657.
Beer Co. vs. Mass., 97 U. S. 25.
Stone vs. Mississippi, 101 U. S. 814.
Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

If the State cannot by an express contract divest itself of the power to protect the health and morals of its citizens, and cannot limit future Legislatures in the exercise of that

power, then it follows in the present case, where the charter contains *no express grant of exclusive privileges in the streets of New Orleans, but only the grant of an exclusive right to lay and maintain gas mains and vend gas,* that such privileges in the nature of a use, as was granted, was granted and taken *sub modo* only, and subject to the implied condition that it was to yield when the public interest demanded.

The plaintiff is in precisely the condition that it would have been had its charter expressly provided that the privilege of laying and maintaining pipes and mains in the streets of New Orleans should never be construed as depriving the State of the power of curtailing and interfering with that privilege when the public health required. The law was and is to that effect; and entered into and became, as it were, a part of the plaintiff's charter. As it must be assumed to have taken and to hold its charter subject to such law, it suffers no hardship in the instant case.

Third Point.

There was no taking of private property in this case within the sense of the constitutional prohibitions, and no impairment of the contract evidenced by plaintiff's charter. The distinction between expropriation resulting from the exercise of the right of eminent domain, and appropriation resulting from an exercise of the police power of the State, is well settled.

The whole argument of the appellant as exhibited in its brief, proceeds upon what we conceive to be a transparent fallacy. That fallacy lies in the assertion that there was a taking of property in this case; and in the failure to recognize the settled distinction between appropriation and expropriation already referred to. We have already

cited cases which sufficiently establish and illustrate the distinction, and we deem it only necessary to call the attention of the Court to the inapplicability of the cases cited in support of the appellant's theory.

First as to the Federal cases: The case of *Chicago vs. Taylor, 125 U. S. 161,* does not apply. That was a case where a lot owner in Chicago sued the city for damages arising out of the erection by the city of a viaduct so near his property as to destroy and impede access thereto. The damages claimed were held recoverable under that provision of the Constitution of Illinois of 1870 which provides that no property should "be taken or applied to public use without just compensation being made."

It must be conceded that this case lends some colorable support to the appellant's contention, but it is only colorable, and the decision cannot influence the decision of the case at bar, because:

1. It is in direct conflict with the decisions of this Court construing the peculiar provisions of the law of Louisiana relating to the extent and character of the public servitudes defined by law, and the extent and character of the police power over the public things that are the subject of such servitudes.

2. It is in direct conflict with the decision of the Supreme Court of the United States in another case which went up from Louisiana and involved the constitutionality of the peculiar provisions of the law of Louisiana relating to public servitudes and the applicability of the provisions of the Constitution of 1879 now relied on. We refer to the case of *Eldredge vs. Trezevant, 160 U. S. 452.*

The most cursory examination will show that these two points are well taken.

Upon the first, we refer the Court to the Louisiana cases cited under the second point argued in this brief.

Upon the second, we call its attention to the fact that the Supreme Court of the United States in *Eldredge vs. Trezevant*, cited *Article 661 of the Civil Code*; the cases of *Dubose vs. Levee Commissioners, 11 An. 165; Bass vs. State, 34 An. 494, and Ruch vs. New Orleans, 43 An. 275;* all relied on by the appellee here; and held that these cases, and the codal provisions established the principle that, as far as the State of Louisiana was concerned, it might take property in certain cases without previous compensation made.

Unless, then, this Court is prepared to depart from its own decisions upheld by the tribunal of last resort, the case of Taylor can afford no comfort to the appellant.

The case of *County of San Mateo vs. Southern Pacific R. R. Co., 13 Fed. Rep. 722,* is not at all in point. That suit was one for the collection of taxes. The defense was that the tax was so unequally and unjustly discriminative as to deprive the defendant of its property without due process of law in contravention of the 14th Amendment of the Federal Constitution. There was no question whatever raised as to the extent of the police power of the State; nor was any such question decided; nor was there any question of the right of the State to temporarily interfere with a grant of *user* by reason of its retention of a servitude in the space where the use was granted.

The case of *Hollingsworth vs. Parish of Tensas, 17 Fed. 110,* is wholly inconclusive. The plaintiff was the owner of certain riparian property which was damaged by the construction of a levee. In suing for this damage, the *plaintiff expressly averred an arbitrary and wanton abuse*

by the police jury of the Parish of the powers conferred on it by law for the erection of levees. To this petition, the defendant filed an exception of no cause of action, which the Court overruled, and very properly. But the reasons given for this action are entitled to no respect. If, in fact, the police jury acted oppressively and caused an unnecessary damage to the plaintiff, that entitled her unquestionably to maintain her suit. Whether the police jury did so act was a question which was necessarily determinable only upon the trial; and hence, on the face of the petition, the exception did not lie. But instead of dismissing the exception on this ground, Judge Boarman, in a very rambling opinion, proceeds to hold that compensation can be recovered by a riparian proprietor who is damaged by the construction of levees. This ruling was made, notwithstanding that the Court had called to its attention the provisions of the Civil Code defining public servitudes and the decisions of this Court, and notably Ruch's case, construing those statutes. Its decision proceeded on the theory that the question was one, not of local, but of general law, upon which the decisions of the highest court of this State were not binding on the Federal courts. This theory is so obviously unsound and so utterly in conflict with the fundamental principles which govern the relations of the State and Federal courts, as to render any extended argument unnecessary. It suffices to add that the case, so far as we can discover, has never been cited as authority; and that its *dicta* are by necessary implication entirely disapproved and rejected in the case of *Eldredge vs. Trezevant*, above cited.

The case of *Levis vs. The City of Newton*, reported both in the *75th and 79th Federal Reporters* (*pp. 215, 884*), is equally without application.

It involved simply a construction of the charter powers of the defendant municipality and the right of the complainant to enjoin certain city ordinances which undertook to repeal prior ordinances conferring privileges in the public streets.

As for the case of *Pumpelly vs. Green Bay Co., 13 Wallace, 166,* it is enough to point out that it was pressed by counsel upon the attention of the Court in *Eldredge vs. Trezevant* (Opinion, p. 458), and not considered as in conflict with the conclusion there reached.

The case of *Western Union Telegraph Co. vs. Myatt, 98 Fed., p. 335,* is also beside the issue here. The Legislature of Kansas had created a "Court of Visitation," somewhat akin to the Railroad Commission of Louisiana, and attempted to vest it with judicial power in respect to making rates for certain public-service corporations, including the complainant. On application for an injunction, the Circuit Court held that the attempt to vest judicial power in such a court was in contravention of the Constitution of Kansas and that a proceeding in such a Court to determine the reasonableness of the complainant's rates was not due process of law within the meaning of the Federal Constitution.

The case of *St. Louis & Iron Mountain R. R. Co. vs. Paul, 62 Am. State Rep. 154,* has not, as far as we can see, the slightest bearing on the case at bar. The plaintiff was a laborer and sued to recover damages for failure to pay his wages. The damages sought were authorized by a State statute and were in the nature of a penalty. The defense was that the act was unconstitutional.

The case of *Little Nestucca Road Co. vs. Tellamook County, 65 Am. State Rep. 802,* also presents quite different questions. The plaintiff company had constructed and

was the owner of a toll road. On the petition of certain residents of the county for the opening of a public road, the Court appointed commissioners who made a survey, locating the proposed new road exactly upon the road of the plaintiff and the county court undertook to make an order authorizing the work to be done in accordance with this survey. The carrying out of this order would have involved the destruction of the toll gates and the complete expropriation of the plaintiff's property. A more flagrant case of spoliation attempted under the forms of law would be hard to conceive. The decision was upon a demurrer to the bill, and dealt mainly with questions of pleading and with the right of the County Court to authorize the work.

The Louisiana cases cited by appellant seem to support its contention as little as the foregoing.

The case of *Erwin vs. Telephone Co., 37 An. 63,* presented the single issue as to whether the City of New Orleans had the right to authorize the erection of telephone poles in its streets, and it was held that it had.

The case of *Pontchartrain R. R. Co. vs. Board of Levee Commissioners, 49 An. 570,* has already been cited by us, and is strongly in our favor.

The plaintiff sued for compensation for damage to its railroad caused by the construction of a levee across such road. The damages claimed arose from the depositing of earth dug to make the levee upon the defendant's tracks and the cost of elevating the grade of the road-bed and taking up and re-laying the tracks; all made necessary by the levee. The Court, in holding the plaintiff entitled to compensation, said:

"The front proprietor on the Mississippi River or other navigable rivers must yield without compensation his property for levee and road purposes. The servitude for levee

and road purposes is imposed on him, and he acquires his property subject to that servitude. Civil Code, Articles 6665 *et sec;*. *Bass vs. State,* 34 An. 494; *Rush vs. City,* 43 An. 275; *Eldredge vs. Trezevant,* 160 U. S. 468. *But the plaintiff's land is not on the river and owes no such servitude.''*

This last sentence shows that the case presented was a totally different one from the case here. There was a real taking of private property acquired under a valid franchise, and not a mere interference with a use in public property such as the appellant enjoyed.

The case of *Shreveport & Red River Valley R. R. Co. vs. St. Louis & S. W. Ry. Co., 51 An. 814,* is very easily distinguished from the case at bar. The City of Shreveport had granted to the defendant company a right of way in certain of its streets. The plaintiff company desired to enter the city limits and to obtain a similar right of way through the same streets. There was in them space enough not granted to the defendant company to accommodate the tracks of the plaintiff; but had such tracks been built, and cars attempted to be run over them, such cars would have projected about a foot over the space whose use had already been granted the defendant. In order to obviate any question of technical trespass after construction, the plaintiff brought suit to expropriate, not any of the land occupied by the defendant's tracks, but a right of use in a space of six feet, which six feet made part of the defendant's grant. Having brought such a suit, it was legally bound to aver that no price had been agreed on, and to tender a fair price into the registry of the court. By adopting such a form of proceeding, the plaintiff necessarily admitted the defendant's right to compensation, and precluded itself from contending that it had under its grant from the city the right

to take a portion of the defendant's use without compensation; and from contending that the city had the authority in the exercise of its police power to grant it such a right. It follows that the question presented in this case was not, and could not have been raised in the Shreveport case.

It may be added that it is tolerably clear that neither the State nor its agents can authorize a quasi-public corporation, like a railroad, to interfere with the use of another railroad in such a case as the Shreveport case, without compensation; for the reason that no question of public health, safety or morals being involved, such interference would not be clearly within the scope of the police power of the State. But the authority which the State could not confer and no railroad company could take, could clearly be conferred and clearly be taken and exercised by such a body as the Drainage Commission, whose every function was designed to subserve a recognized necessity of the public health of New Orleans.

This criticism equally applies to the cases cited of *Benson vs. Mayor, 10 Barb. 345, and Miller vs. N. Y. R. R. Co., 21 Barb. 513.*

There are other cases cited by the appellant, but we do not deem it necessary to advert to them specifically, as they all belong to one or the other of the categories, to which the cases we have attempted to distinguish, belong.

In conclusion, we respectfully submit that the judgment of the court below was clearly correct, and should be affirmed.

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New Orleans, January, 1902.

XL.

Brief on Behalf of the Drainage Commission, Defendant and Appellee, on Rehearing.

In this brief, we do not desire that the discussion should take as wide a range as was given to it in the original oral argument and in the original brief, and shall confine the discussion here to two points:

1st. That the Gas Company had only the right of user in the public streets, along with all other citizens, and acquired no right of public ownership or property in or to any part of the public streets by virtue of its charter provisions.

2nd. That it took this right of user subject to the implied condition that the State or the City might, in the exercise of the police power for the public health or public safety, cause other structures to be placed in or on such streets, which might temporarily inconvenience the Gas Company in its use, or which might occasion the removal to another part of the street of its mains and pipes; and that any damage resulting from such temporary inconvenience, or from such removal, was *damnum absque injuria.*

First Point.

The Gas Company has only a right of user in the public streets, along with all other citizens, and acquired no right of private ownership of property in or to any part of the public streets by virtue of its charter provisions.

Whatever may be the rule of law elsewhere, it admits of no question in this State that the fee of property of the public streets in the City of New Orleans is vested in the public at large, and that no abutting owner or any other

person has, or can acquire, any property in or to the soil of a public street. The use of the street is dedicated to the use of the public, and it would not be competent for the State or the City to grant or to give to any particular person or corporation the exclusive use and occupancy of a public street, so as to deprive other citizens, or so as to deprive itself, acting for the benefit of the public, of ever making use of such street for other legitimate purposes. We take it that these propositions are axiomatic.

2 Dill. Mun. Corp. (3 ed.) § 683.

The Legislature in the various acts incorporating the constituent companies which compose the plaintiff Company, never gave to the plaintiff the exclusive right to use the public streets of the City of New Orleans, or the exclusive right to any particular portion of such streets. It is true that it gave the plaintiff Company the exclusive right to sell illuminating gas in the City of New Orleans, but gave it no exclusive right to the use of the streets. As a necessary incident to enable it to carry on its business of furnishing the public with gas, it gave the plaintiff Company the right to lay its mains and pipes under and through all the streets and alleys of this city and impliedly a right to maintain same, provided that such work should be done and maintained with as little inconvenience to the public as possible. Surely, such a grant as this would never be construed as giving the plaintiff Company a property right in or to any particular portion of the street. Neither did the Legislature attempt to designate the particular streets or alleys in which the plaintiff Company should lay its pipes and mains; nor to locate the particular part of the streets or alleys in which such pipes and mains should be laid; nor did it vest any officer or City Council of the City

of New Orleans with authority to locate such pipes, nor to regulate the location thereof. In other words, the whole subject was left to the judgment and at the risk of the Gas Light Company, with only a warning that they should lay them in such manner as to least inconvenience the public. And under such circumstances as these the Gas Company necessarily took the risk of the location of its pipes.

If, therefore, the Gas Company could not acquire any property in the public streets, necessarily its rights were merely the right of user, such a right as any other citizen similarly situated has, or a street railway company has, a right of passage.

It follows as a corollary to this proposition, that neither the State nor the City, by reason of this grant of user to the Gas Company, lost the right of control or use of the streets for other legitimate purposes; and even if the grant to the Gas Light Company was for a public use, yet this did not impair or exhaust the right of the State or City to make other grants, or to build in such streets other works equally for the public comfort or public health.

Chicago Ry. Co. vs. Quincy, 27 N. E. Rep. 192, at p. 193.
Same vs. Same, 28 N. E. Rep., at p. 1070.
Kansas vs. Morley, 45 Mo. App. 304.

While the learned counsel for the plaintiff does not expressly claim any other or greater rights than a right of user in the streets, yet the logical result of his argument is a claim to an exclusive right, or to a property right, in that particular portion of the streets in which the Company's mains are laid. In fact, he is driven to this position, for once he admits that the Company's right is a mere right of user, it inevitably follows, as we shall hereafter see, that the State or City has a right to regulate that user, which is all we contend for in this case.

SECOND POINT.

The Gas Company took the right of user subject to the implied condition that the State or City might, in the exercise of the police power for the public health or public safety, cause other structures to be placed in or on such streets which might temporarily inconvenience the Gas Company in its use, or which might occasion the removal to another part of the street of its mains and pipes; and any damage resulting from such temporary inconvenience, or from such removal, was *damnum absque injuria*.

If our first point is well taken, it remains to be considered what are the rights of the plaintiff in the streets, if it has a right to enjoy the use thereof only in conjunction with, and not to the exclusion of the general public, or of works admittedly of at least equal importance to the health and comfort of the public; and whether its right to use the streets is paramount or subordinate to the rights of the general public.

Our contention in this case is, that the enforced removal of the plaintiff's mains to another part of the street in order to make room for a necessary and important public work, was a mere police regulation of its right of user, and was in no proper sense a taking or damaging of private property or a divesting of any vested right which would entitle it to compensation. In fact, for the purposes of this case, and for the sake of the argument, we might well admit that the plaintiff had a vested right to use *some* part of the streets, and could not be absolutely divested of such right without compensation, and yet not weaken our position, that such vested right could be regulated in a reasonable manner for the public good.

The plaintiff surely can claim no greater or more sacred rights than those which have been conferred upon street

railway companies by the purchase for a valuable consideration paid of franchises to lay tracks and operate cars upon the streets, and yet it could hardly be seriously contended that a street railroad company could object to the paving or other improvement of a street upon the ground that it would subject it to interruptions of traffic and incidental damages resulting therefrom. Many steam railroads entering this city have legislative grants to use the public streets, yet no one would seriously contend that the City has not the right, nevertheless, in the exercise of its police power for the public safety, to require them to erect and maintain at their own expense, gates, at street crossings, or to regulate the speed or the length of their trains, even though compliance with such regulations might impose upon them great expense and much inconvenience; and while it might be admitted that neither the City nor the State could thereafter divest the Railroad Company of its right to use such street, either could undoubtedly regulate that use in a reasonable manner without making compensation or making itself liable for damages.

And in the same way, if it becomes necessary in the prosecution of some great public work in the interest of the public health, to temporarily suspend that use, the Railroad Company would have to submit to the resulting damages.

In the case of *Chicago Railroad vs. Chicago*, 166 U. S. 226, at page 254, the Supreme Court of the United States, treating a similar question and citing the Supreme Court of Illinois said:

" 'The items of expense for which the appellant claims compensation are such only as are involved in its compliance with the police regulations of the Statutes. It is well settled that neither a natural person nor a corpora-

tion can claim damages on account of being compelled to render obedience to a police regulation designed to secure the common welfare. *Chicago Railroad vs. Joliet Railroad*, 105 Ill. 388.

"'And it has been held by this Court in a number of cases that railroad corporations may be required to fence their tracks, to put in cattle guards, to place upon their engines a bell, and to do other things for the protection of life and property, although their charters contained no such requirement (citing authorities). Uncompensated obedience to a regulation enacted for the public safety under the police power of the State, is not a taking or damaging without just compensation, of private property or of private property affected with a public interest. *Mugler vs. Kansas*, 123 U. S. 623, 668; *Boston R. R. vs. County*, 79 Me. 386; *Charlotte R. R. vs. Gibbes*, 142 U. S. 386, 393.'

"We concur in these views. The expense that will be incurred by the Railway Company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required—necessarily result from the maintenance of a public highway under legislative sanction and must be deemed to have been taken by the Company into account when it accepted the privileges and franchises granted by the State. Such expenses must be regarded as incidental to the exercise of the police power of the State. * * * "

This was a case arising under the Constitution of Illinois, which contained a provision exactly similar to the provision of our Constitution of 1898 regarding compensation for property taken or damaged for public use.

The existence of this right of regulation is essential to the welfare of the public, and without it, the State or City would be powerless to perform its first duty to its citizens, namely, to protect their health, welfare, and safety, in case any prior corrupt or improvident government should have

granted to privileged or favored corporations the right to use the streets of a city. It is recognized that conditions of life change, and what may seem a reasonable and proper use of the streets, or what may seem to be ample protection for the health or safety of the citizen in one generation might be utterly unreasonable or entirely inadequate for another. So it is that the courts have uniformly held that the power to regulate the streets was not only a continuing power, but also an inalienable one.

Chicago vs. Quincy, 27 N. E. Rep. at 193.

In the case of *Mugler vs. Kansas City*, 123 U. S. 623, at pages 664, 665, the Supreme Court of the United States said:

"This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended by adopting that Amendment to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile legislation, this Court, in *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746, 751, said that the State could not by any contract limit the exercise of her power to the prejudice of the public health and the public morals. So, in *Stone vs. Mississippi*, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter granted to a private corporation to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the Court said: 'No Legislature can bargain away the public health or the public morals. The people themselves cannot do it—much less their servants. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them.'

"Again, in *New Orleans Gas Light Co. vs. Louisiana Light Co.*, 115 U. S. 650, 672: 'The Constitutional pro-

hibition upon State laws impairing the obligation of contracts, does not restrict the power of the State to protect the public health, the public morals, or the public safety as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with the State are subject to the regulations for the protection of public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations.'

"The principle that no person shall be deprived of life, liberty or property, without due process of law, was embodied in substance in the Constitution of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co. vs. Mass.*, 97 Mass. 25, 32. * * *"

If, therefore, this right of regulation always exists, and cannot be bartered away, all privileges such as that granted to the plaintiff must be understood to have been granted and accepted subject to the implied condition that the State or city, in the exercise of the police power, may regulate, limit or modify that use whenever and wherever the safety, health or welfare of the public demands it. It may be that under our Constitution, the State or the City would not be permitted, without making due compensation, to completely deny or destroy the right, or so unreasonably regulate it as to amount to a denial or destruction, but such is not the case here. While the plaintiff in its petition alleged that the interference with its use of the streets was unnecessary and unreasonable, it offered no proof to sustain that alle-

gation, but on the contrary, the proof in the record is that the regulation was a necessary and reasonable one. So that this case must stand upon the basis of a necessary and reasonable regulation of the plaintiffs' right of use of the streets. The plaintiff has not been deprived of its right to use a single street where its mains have been laid; it has only been required to remove its mains to one side of the street to permit the construction of sewers. The public health required this, and the public would have been inconvenienced had they not been changed; and we believe that it is not unfair or unreasonable to say that the Legislature intended by the provisions in the Company's charter, namely, that it should lay its pipes and mains at its own expense "in such manner as may produce the least inconvenience to the City or its inhabitants"—that the right granted should always be subordinate to the paramount right of the public, and that the Company should at all times yield without compensation to the necessities of the public welfare.

An exhaustive examination of the authorities (prompted by the importance of the questions involved to the City, which is about to enter upon works of great magnitude for the public good) has confirmed us in our opinion that the plaintiff's claim is unfounded. We have found numerous authorities from respectable courts sustaining the views hereinabove expressed, and we state sincerely to the Court that we have been unable to find a single case (except where a statute expressly required the City to pay the expense of removal of structures in streets when necessary for public improvements) in which it has been held that a Gas Company, street railroad, or other corporation having a right to lay its pipes or rails in a street, could recover damages for the expense of removal

thereof or for losses incident thereto, when such removal or losses were occasioned by police regulations designed to protect the public health or safety.

We shall now briefly review some of the cases sustaining our contention stated in the heading under this second point, and for a fuller discussion of the general principles involved respectfully refer the Court to the original brief, which is appended hereto.

National Water Works Co. vs. Kansas City, 28 Fed. Rep. 921 (Mr. Justice Brewer). This was an action for damages. In 1883, the plaintiff company laid a water pipe in one of the streets of the City of Kansas. The grade of this street had been previously established and the plaintiff had been directed by the City to lay a water pipe therein, and the same was laid in the place and manner directed by the City. In 1884, the City dug a sewer on said street in the same part of the street in which the plaintiff's water pipe had been laid, in consequence of which the plaintiff was compelled to take up and lay its pipe in another place. The action was brought to recover the cost and expense of this relocation. That case is even stronger than the case at the bar, in that the City had directed the place and manner in which the plaintiff should lay its main, and the Water Company contended that, under the circumstances, it had acquired such a vested property right in an undisturbed location and position to entitle it to resist any further trespass or invasion thereof. The answer of the City was that the matter of sewerage was one affecting the public health; that it could not, if it would, and that it did not, if it could, contract away the right to construct sewers in any part of the public streets; that the plaintiff took its contract to lay its pipes in such public streets subject to the paramount and inalienable right of the City to construct its sewers

whenever, in its judgment, the public interest demanded. The learned Justice sustained the City's contention, and said:

"Sewerage is a matter unquestionably affecting largely the public health, and no municipality can make a contract divesting or abridging its full control over such matters. * * * The contract between the plaintiff and the defendant is to be interpreted in the light of this well established rule; and so interpreted, the plaintiff took its right to lay its pipes in the streets of the City, subject to the paramount and inalienable right of the City to construct sewers therein whenever and wherever in its judgment the public interest demand. Laying its pipes subject to this right of the City, it has no cause of action if, in consequence of this right, itis compelled to re-lay its pipes. It is true, that petitioner alleges that there was ample room in the street for such a sewer, and it may be that any malicious and unreasonable action by the City in the exercise of the right to construct sewers making damage to the plaintiff, may be the foundation of a claim for damages. But the City is presumed to act without malice, to act reasonably and as in its judgment the interests of the public demand. The mere fact that there is other space which might be occupied by the sewer, while it may be a circumstance tending to show, does not of itself prove that the City acted maliciously or unreasonably; hence, the allegation, as it stands, is not such a one as of itself exposes the City to liability. Under these circumstances, the demurrer of the petition must be sustained."

Railroad Co. vs. Wakefield, 103 Mass. 261. This was an action by the Railroad Company against certain Commissioners who were authorized and directed by law to widen the drawbridges in the Charles River Bridge and in the Warren Bridge, to restrain them from widening the said drawbridges in such a manner as to prevent the plaintiff

Company from running its cars as usual over those bridges without interruption. It appeared that the Commissioners found it necessary, in order to increase the width of the drawbridge, to suspend all traffic over the bridge, and that the work would consume from four to six weeks, and the allegation was that the interruption would cost the plaintiff Company a loss in business of about four hundred dollars a day. The plaintiff Company had a franchise authorizing it to lay its tracks and to operate its cars over and along certain streets of the City and over and across these bridges which formed a connecting link in its street railway line. the Supreme Judicial Court, affirming the lower court, which had sustained a demurrer to this bill, said:

"In our judgment, the right of way granted to the plaintiff upon these bridges, is the same as it is everywhere else, a right to use the highway in common with others. The favor granted to them of adapting a certain portion of such bridge to their peculiar method of conveying passengers, was not intended to give them the control of the way; and upon the bridges as well as elsewhere, and by these plaintiffs as well as by all others, the right of passage is to be enjoyed in subordination to the general right of the appropriate public authorities to make from time to time such needful repairs, alterations, and improvements as the public good may require."

On these grounds, the Court said that it could not view the statute authorizing the change in the bridges "as an encroachment upon the plaintiff's charter or a withdrawal of any part of their grant," and hence dismissed the bill.

Jamaica Bond Co. vs. Brookline, 121 Mass. 5. This was an action for damages to recover expense of changing the location of certain water pipes. Plaintiff alleged that it had theretofore laid water pipes on the street, under its

charter, in accordance with the established grade of the street. That the City had changed the grade and required the plaintiff to change the location of its pipes, to plaintiff's great injury and damage. The Court held that the injury was *damnum absque injuria.*

Columbus Gas Co. vs. Columbus (Supreme Court of Ohio), 19 Lawyers' Reports, Annotated, 510. This was a suit for damages for expense of relocating gas pipes to conform to a change in the established grade of a street made by the City of Columbus. The Court held that: "A gas company laying its pipes in the streets of a city, under a grant from the city, in conformity with an established grade, does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it; and, in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to the new grade."

Cincinnati vs. Penny, 21 Ohio State, 499. The plaintiff sued for damages for injuries to his dwelling, situated on a lot abutting a city alley, in which alley the city had constructed, or was constructing, a public sewer. In digging out the sewer, the lateral support to the foundations of the plaintiff's house were withdrawn, so that such foundations gave way. It appeared that the work had been carefully done, and that the damage could not reasonably have been avoided. It was held that the injuries sustained were *damnum absque injuria.*

Clapp vs. City of Spokane, 53 Federal, 516. This was a suit for an injunction to prevent the City of Spokane from interrupting the operations of an electric street railway by

constructing a sewer in one of the streets in which the railway was located. The railway was double tracked, and occupied the middle part of the street, having a single line of poles situated in the space between the tracks supporting cross-beams from which the wires were suspended. It was owned and operated by a corporation to which the city had given franchises authorizing the construction mentioned. It was proposed to put a sewer in the center of the said street in such a manner as to necessitate the taking down of said poles and obstructing of the tracks so as to prevent the operation of the railway during the time to be consumed in its construction. The bill of complaint alleged that this construction was wholly unnecessary, as there was a space of forty feet wide in the street on the outside of each track. It was contended on the part of the City that a sewer in said street was essential to the public welfare, and that the city had power to construct it; that the City had control of said street and of every part of it, and might, if necessary, for the accomplishment of any public work which it was authorized to undertake, obstruct it and suspend all travel therein; that the franchise of the Railway Company was subordinate to the power of the City to control said street, and the City might even require the owner of it to remove the railway at its own expense, if necessary, for the purpose of putting a sewer in said street.

The Court, passing upon this contention, said:

"While the power of the City is ample, it is also limited. The validity of its ordinance must be tested by the rule that reason must control its conduct, and the courts are required to shoulder the burden of deciding what is reasonable whenever individuals complain of unreasonableness in the provisions of City ordinances affecting them

(1st Dill. Mun. Corp., 3d Ed., Secs. 319, 321), and in the exercise of all the powers of a municipal corporation, the bounds of necessity and reason must not be overstepped to the injury of private rights. Now, is it unreasonable and oppressive for the City, after having by its ordinances authorized the construction of this street railway and designated the particular part of the street to be occupied by it, with ample room elsewhere in the street, to so locate a sewer as to cause the greatest damage to the Railway Company? I think that it is, and that the proposed action of the City is, therefore, an unlawful exercise of its power. There may be a sufficient reason for putting the sewer in the center of the street, which can be shown by the defendants when they answer the bill, but as no necessity or reason appears from the statements contained in the bill, the demurrer cannot be sustained on this ground.

"The bill avers that it is possible to construct a sewer in the center of the street without interfering with the railway. But as the contrary is not alleged, I assume that it would be impracticable to do so on account of the additional cost; and, I have, therefore, treated this as an immaterial allegation. I hold that the City is not required to incur any considerable additional expense by reason of having granted a free right to the use of the streets for this railway."

It is clear from this reasoning that the Court was of the opinion that, if the necessity existed for the construction of this sewer in the middle of the street, that the Railway Company would have to bear the loss incident thereto.

We respectfully submit to the Court, that all of these cases are directly in point with the case at bar and should be decisive of the issues here; that all of the cases cited by the learned counsel for the plaintiff present a different state of facts, and are cases where there was a direct in-

vasion of private property actually owned in fee by the parties complaining, and none of them are cases where the party complaining held a mere right of user in a public street.

In conclusion we desire to call the Court's attention: First, to the great importance of this case to the City Government of New Orleans and to the citizens of this City. This City is about to inaugurate works of public improvement of great magnitude and of inestimable value and importance to the health of the City, all of which are being done in the exercise of the police power of the City, and if this Court should decide that the City could not carry on these great public works without compensating the street railway companies, gas companies, water works companies, electric light companies, telephone companies, telegraph companies, and innumerable other corporations to whom grants and franchises in the public streets have heretofore been made, a great part of the funds voted by the people for these necessary public works will be dissipated in paying damages for loss of business, inconvenience, the expenses of removals and repairs on the part of all of these corporations, and in the expenses of litigation interminable. And furthermore, it would forever debar the City of New Orleans from making any public improvements in the streets, or from exercising its police powers for the safety and comfort of its citizens, unless it should pay tribute to any corporation or person whose business or affairs might be inconvenienced or damaged by such works. In the second place, as your Honors' original opinion seems to have conveyed the idea to some, that it was a denial of the fact that the Drainage Commission, a State institution expressly created by the State for the purpose of this great work, was not vested with any part of the police power of

the State, we desire to call your Honors' attention to the fact that this question has been before the Court and it was expressly decided that, in the performance of this drainage work, the Drainage Commission was exercising the police power of the State in that respect.

State vs. Walter C. Flower and Others, 49 An. 1199, at p. 1202.

We, therefore, respectfully submit that your Honors should set aside the judgment heretofore rendered, and affirm the judgment of the lower court.

Respectfully submitted,

HOWE, SPENCER & COCKE,

Of Counsel for the Drainage Commission.